

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 29th day of November, two thousand eleven.

PRESENT: DENNIS JACOBS,
Chief Judge,
JOSÉ A. CABRANES,
DEBRA ANN LIVINGSTON,
Circuit Judges.

- - - - -X
UNITED STATES OF AMERICA,
Appellee,

-v.-

10-3663-cr

GEORGIA F. BOWEN, a/k/a GEWNDOLYN TEMPLE
EMMET, a/k/a GWENDOLYN GODIVA EMMET,
a/k/a GWENDOLYN EMMET, a/k/a GEORGIA G.
EMMET, a/k/a GWENDOLYN G.T. EMMET, a/k/a
GEORGIA BOWEN EMMET, a/k/a GWENDOLYN G
TEMPLE T,
Defendant-Appellant.

- - - - -X

1 **FOR APPELLANT:**

E. Carey Cantwell, E. Carey
Cantwell, P.C., Buffalo, NY.

4 **FOR APPELLEE:**

Joseph J. Karaszewski, for
William J. Hochul, Jr., United
States Attorney for the Western
District of New York, Buffalo,
NY.

10 Appeal from a judgment of the United States District
11 Court for the Western District of New York (Skretny, C.J.).
12

13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
14 **AND DECREED** that the judgment of the district court be
15 **AFFIRMED.**
16

17 Georgia Bowen appeals from a judgment of conviction
18 entered on September 3, 2010 by the United States District
19 Court for the Western District of New York (Skretny, C.J.)
20 for aggravated identity theft in violation of 18 U.S.C.
21 § 1028A. We assume the parties' familiarity with the
22 underlying facts, procedural history, and issues presented
23 for review.
24

25 Bowen contends that her former attorney failed to
26 properly advise her of the immigration consequences of the
27 plea agreement that he advised her to accept. She therefore
28 seeks to withdraw her plea agreement under Padilla v.
29 Kentucky, 130 S. Ct. 1473 (2010), which holds that failing
30 to properly advise a client of the immigration consequences
31 of a guilty plea is ineffective assistance. Id. at 1483.
32 Bowen pled guilty to aggravated identity theft in violation
33 of 18 U.S.C. § 1028(a), rendering her deportable under
34 section 237(a)(2)(A)(iii) of the Immigration Nationality
35 Act. See 8 U.S.C. § 1227(a)(2)(A)(iii); see also id. §
36 1101(a)(43)(M)(i) (defining aggravated felony to include an
37 offense that "involves fraud or deceit in which the loss to
38 the victim or victims exceeds \$10,000"). After Bowen pled
39 guilty but before sentencing, her attorney withdrew for
40 health reasons and died soon after.
41

42 After obtaining new counsel, Bowen moved to withdraw
43 her guilty plea because, *inter alia*, she had not been
44 properly advised of its immigration consequences. However,
45 the attached affidavit swore that her former attorney
46 "misinformed her that she had no relief to get from
47 deportation it was a must" (an averment said to reflect

1 incompetence because her own subsequent research revealed
2 that relief was available). Although Bowen later contended
3 that her attorney had not in fact advised her of the
4 mandatory deportation that attached to her conviction, the
5 district court credited her earlier affidavit and denied her
6 motion to withdraw her plea.
7

8 Although we normally prefer to defer resolution of
9 ineffective assistance claims until a later motion under 28
10 U.S.C. § 2255, see Massaro v. United States, 538 U.S. 500,
11 504 (2003), the record before us is sufficient to resolve
12 Bowen's claim, see United States v. Hasan, 586 F.3d 161, 170
13 (2d Cir. 2009). We review an ineffective assistance claim
14 de novo, see Arteca, 411 F.3d 320, 320 (2d Cir. 2005), but
15 accept the district court's factual findings unless they are
16 clearly erroneous, see United States v. Monzon, 359 F.3d
17 110, 119 (2d Cir. 2004). We owe particular deference to
18 factual findings premised on credibility determinations, and
19 where there are two competing, permissible views of the
20 evidence, a choice between them cannot be clearly erroneous.
21 Id. The district court's finding that Bowen's attorney
22 properly advised her of the immigration consequences of her
23 plea, when she admitted as much under oath, is far from
24 clearly erroneous.
25

26 The district court did not err by deciding the motion
27 without an evidentiary hearing. A district court's decision
28 on whether to hold an evidentiary hearing for a claim of
29 ineffective assistance is reviewed for abuse of discretion.
30 See United States v. Levy, 377 F.3d 259, 264 (2d Cir. 2004).
31 On the record before it, including Bowen's own admission of
32 the advice she received, the district court's decision was
33 not an abuse of discretion.
34

35 Finding no merit in Bowen's remaining arguments, we
36 hereby **AFFIRM** the judgment of the district court.
37

38 FOR THE COURT:
39 CATHERINE O'HAGAN WOLFE, CLERK
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